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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, Jr., JAMES M. SCHWABACHER, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

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Counsel for Appellants.

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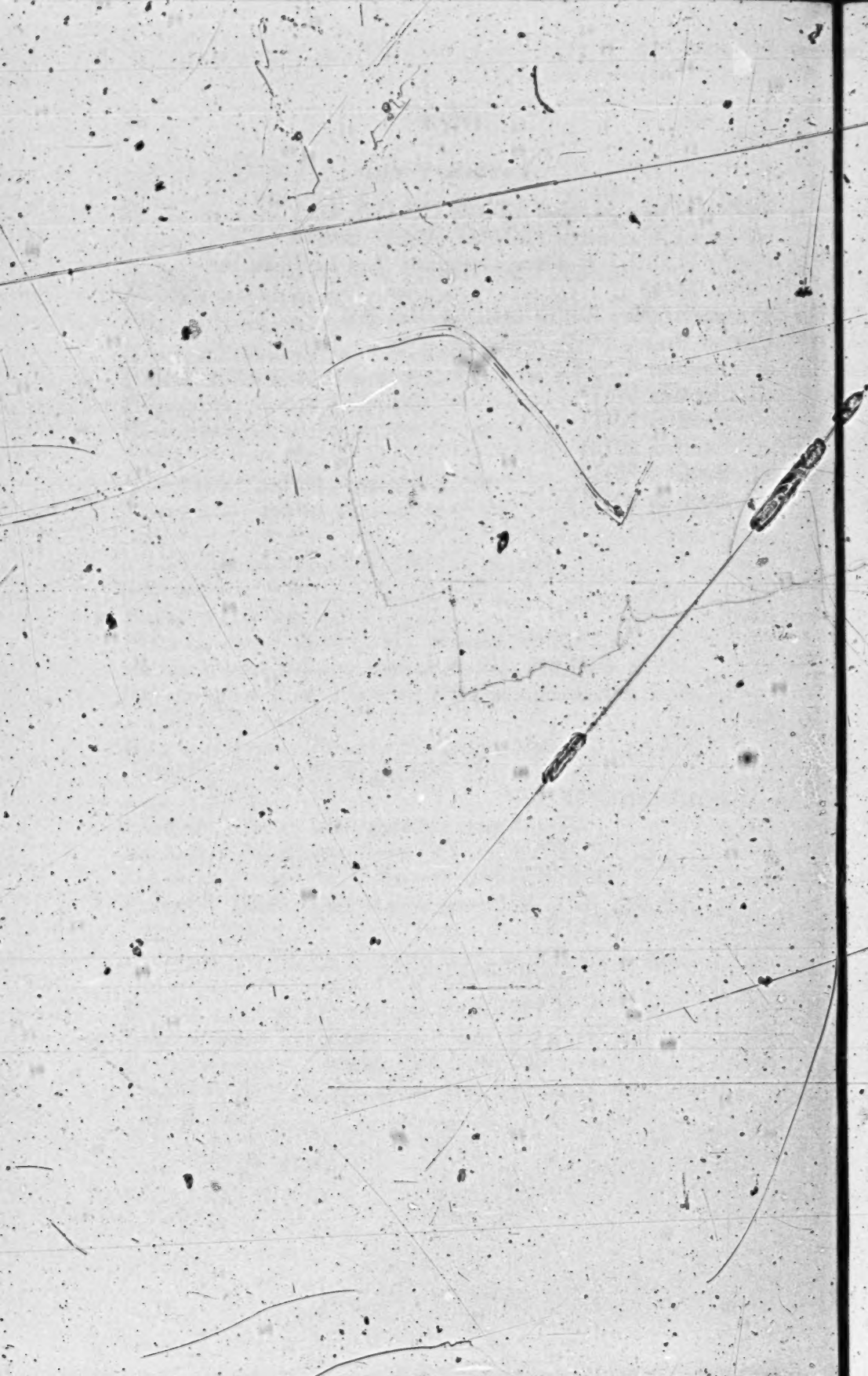

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 713

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, Jr., JAMES M. SCHWABACHER, MAY K. SCHWABACHER, ETHEL S. SOKOLOW, AND JOHN L. SCHWABACHER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ET AL.,

Defendants.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT IN QUESTION.

The plaintiffs-appellants, having presented this day their petition for appeal, now file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the final judgment and should exercise such jurisdiction in this case.

This appeal is prosecuted from a final judgment which dismissed plaintiffs' complaint seeking to enjoin an order of the Interstate Commerce Commission which approved an application for the merger of the Chesapeake and Ohio

Railway Company and the Pere Marquette Company under the terms of the Interstate Commerce Act, as amended. The grounds for the injunctive relief were that the Commission had failed to perform its statutory duty in approving the proposed merger agreement in that it expressly declined to determine or recognize the rights of dissenting shareholders or to protect their interests.

(A) The Statutory Provision Believed to Sustain the Jurisdiction

The final judgment here appealed from was entered in the District Court of the United States for the Eastern District of Virginia, on June 16, 1947, by a statutory court consisting of one Circuit and two District Judges specially convoked under and by virtue of the provisions of Section 210 of the Judicial Code (28 U. S. C. A., Sec. 47a). That statute contains the following:

> A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decreee . . .

Thereby the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question.

(B) The Federal Statutes and Administrative Orders Involved

The plaintiffs' complaint contends that a certain administrative order entered by the Interstate Commerce Commission on April 1, 1947, constituted a violation of the Commission's statutory duty to protect the rights of the dissenting shareholders of the Pere Marquette Railway Company in connection with the approval of the merger agreement re-

ferred to above. The portions of the Interstate Commerce Act (49 U. S. C.), as amended, which are pertinent to the present controversy are as follows (emphasis supplied):

§5. *Combinations and consolidations of carriers.* * * *

(2) *Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties therefore in separate ownership. * * *

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission * * * shall afford reasonable opportunity for interested parties to be heard. * * * If the Commission finds that, subject to such *terms and conditions* and such modifications as it shall find to be *just and reasonable*, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the *terms and conditions, and with the modifications*, so found to be *just and reasonable*. * * *

(11) *Plenary nature of authority under section.*

The authority conferred by this section shall be *exclusive and plenary*, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have *full power* (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the

number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. (Sept. 18, 1940, ch. 722, title I, § 7, 54 Stat. 985.)

* * * * * * * *

§20a *Securities of carriers: issuance, etc.*

(2) *Issuance of securities; assumption of obligations; authorization.*

* * * It shall be unlawful for any carrier * * * to assume any obligation or liability * * * in respect of the securities of any other person, natural or artificial * * * unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission * * * of

the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. * * *

(3) *Scope of Commission's authority.*

The Commission * * * may from time to time, for good cause shown, make such *supplemental orders* in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied * * *

(7) *Jurisdiction of Commission as exclusive and plenary.*

The jurisdiction conferred upon the Commission by this section shall be *exclusive and plenary*, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein. * * *

(11) *Securities issued contrary to law void; effect; penalty.*

Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters

preceding the entry of such order of authorization. (Feb. 4, 1887, ch. 104, part I, § 20a as added Feb. 28, 1920, ch. 91, § 439, 41 Stat. 494, and amended Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

The final administrative order involved is that of the Interstate Commerce Commission issued on April 1, 1947, designated as Finance Docket No. 15,228, promulgated by Division 4 (Complaint, Exhibit 1-A, Order following sheet 38), as to which petitions for rehearing by the full Commission were denied by order on May 20, 1947 (*id.*).

(C) The Date of the Judgment Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The final judgment here sought to be reviewed was entered and spread of record on June 16, 1947.

The petition for appeal herein was presented and filed on July 22, 1947.

(D) Statement Showing That the Nature of the Case and of the Rulings of the Court Was Such as to Bring the Case Within the Jurisdictional Provision Relied upon.

On March 8, 1946, the Chesapeake and Ohio Railway Company and the Pere Marquette Railway Company, together with Alleghany Corporation, applied to the Interstate Commerce Commission for authorization to consummate an agreement of merger between the two railway companies. This application was filed pursuant to the provisions of Section 5 of the Interstate Commerce Act, as amended, relating to voluntary consolidations, mergers or acquisitions of control of rail carriers and Section 20a of said Act relating to restrictions on the issuance of securities and the assumption of liabilities. Prior to the filing of said appli-

cation a majority of the shareholders of each corporation had approved the merger agreement proposed by the companies as required by Section 5(11). Thereafter, plaintiffs as well as other shareholders filed notices of dissent. A hearing was held before an Examiner of the Interstate Commerce Commission on the proposed merger agreement, at which time evidence was introduced for the purpose of justifying the merger in all respects. Following this hearing, a proposed report was issued favoring the applicants. Plaintiffs intervened in the proceeding before the Commission at this point and made their objections known by exceptions to the proposed report and order, by oral argument before Division 4, and—after the Division had made its report approving the merger—by appropriate petition for rehearing which was denied by the full Commission.

Plaintiff duly contended before the Commission that the ratio of stock exchange proposed in the agreement of merger was not "just and reasonable" as those words of section 5(2)(b) required, because the proposed ratio of exchange violated their contractual and statutory rights as the holders of preferred stock in Pere Marquette under the laws of the State of Michigan (Complaint, Exhibit 1-A, Sheet 5) where Pere Marquette was incorporated (until its existence was terminated by the merger here involved; *id.* 11) and pursuant to the laws of which their stock had been issued to and held by them. Their stock was admittedly $100 par value 5 per cent *cumulative* preferred (*id.* 10), *dividends* on which have been in arrears since 1931 in the sum of at least $72.50 (*id.* 29)[1] so that their equity under Michigan law per share was at least $172.50—whereas plaintiffs contended that the merger proposal offered them only $100 in

[1] Now actually $76.25.

value in securities of Chesapeake and Ohio[2] so that their equity would be cut down in the exchange—if the merger were approved—by over $70 per share. It was admitted that the ratio for the exchange of securities was calculated by Chesapeake and Ohio—which controlled and managed Pere Marquette (*id.* 3-4) and had been "preparing" it for years for merger (*id.* 26)—at the going New York Stock Exchange price (*id.* 22-24) without any consideration of the legal equities of the holders of preferred stock whatever. In the Commission proceedings plaintiffs claimed the right to receive, in cash or in equivalent marketable securities (*Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 598; *Clearwater* v. *Meredith*, 1 Wall. 25, 39-41), their whole equity in full priority under either or both the corporate charter of Pere Marquette and the merger statute of Michigan.

The charter provision respecting Pere Marquette preferred provides for full payment of par plus accrued unpaid dividends (here amounting to at least $172.50 instead of the $100 offered) "in the event of dissolution, liquidation, or winding up of the company, voluntary or involuntary * * * before any amounts are paid to holders of the * * * common stock" (Complaint, Exhibit 1-A, Sheet 30). Where "stockholders receive their distribution in kind" (that is, in stock) it has been held to be "in fact and law a liquidation of assets" and a "winding up." *Constitutional Co.* v. *United States*, 259 U. S. 156, 177. Likewise, where one Michigan corporation "sells" its assets to a successor, it is a "winding up." *Mason* v. *Pewabic*

[2] See Complaint, Exhibit 1-A, Sheet 25, at which it was estimated, on one basis, that the securities offered in exchange were of a possible value of $111.60. (They are now actually selling on the exchange at under $100.) In par values the Pere Marquette will receive only $90 in new shares of Chesapeake and Ohio (Proxy Statement, pp. 8 and 63). Since among other things Chesapeake and Ohio common was then actually selling at over $50 although of $25 par value, plaintiffs arrived at the $100 approximation.

Mining Co., 133 U. S. 50, 58, 64. Here the merger agreement itself expressly provides that the corporate existence of the Pere Marquette "will cease" on consummation of the merger (*id.* 11); and the Michigan statute expressly provides for only one corporation "to survive in the case of a merger" (Michigan Statutes Annotated § 22.233). Consequently, on this ground plaintiffs insisted throughout the proceedings that the merger agreement should not be approved unless and until provision had been made for the payment to them of their full legal equity per share.

Moreover, it is expressly recognized that the merger is to be accomplished "under the enabling statutes" of Michigan (*id.* 8). The pertinent statute of the latter state permitting Pere Marquette to be dissolved and its property merged with the Chesapeake and Ohio provides, as an express condition, that "the debts, liabilities and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it" (Michigan Statutes Annotated, § 22.234).[3] Similar language has been construed by the Supreme Court of Michigan (in another of its corporation statutes) in *Sutton* v. *Globe Knitting Works*, 276 Mich. 200, 276 N. W. 815 (1936), where a corporation attempted to eliminate by majority vote redemption rights of preferred stock; and it was held that the state legislature had not and could not authorize such a deprivation of such vested contractual rights (pp. 209-210).

[3] The merger agreement evades this language (*id.* 11; and Proxy Statement, Art. II, p. 17). Language similar to that of the Michigan statute quoted in the text was before the Court, and given effect, respecting other forms of liability after a consolidation in *New York, C. & St. L. R. Co.* v. *Frank*, 314 U. S. 360, 361-362; and see both the concurring statement of Mr. Justice Douglass (p. 373) and the Commission's own prior decisions reviewed by Mr. Chief Justice Stone (pp. 384-385).

A fortiori the same is true of rights to accruals of unpaid dividends as here involved.

Plaintiffs therefore contended before the Commission that these contractual rights were beyond the authority of a majority of Pere Marquette to change (*Voight* v. *Remick*, 260 Mich. 189, 204, 205, 244 N. W. 446, cert. denied 289 U. S. 756), that liabilities in this respect must be carried over into a successor corporation upon a merger (as heretofore set forth in the previous paragraph), and that such rights of preferred shareholders are vested and binding upon all tribunals. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 196, 198; *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315, 336, 340-341; *Beford* v. *Eastern Building and Loan Assn.*, 181 U. S. 227, 240. Attention of the Commission was called to the fact that Chesapeake and Ohio had since 1929 controlled Pere Marquette through ownership of approximately 70% of the latter's common stock and had installed common officers and directors (Complaint, Exhibit 1-A, Sheets 3-4), so that the merger proposal was admittedly not an arms-length agreement (*id.* 32) and therefore required that special care be taken to protect minority interests. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 492; *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 598 *et seq.* Plaintiffs pointed out that both section 5 and section 20a of the Interstate Commerce Act vested the Commission with "exclusive and plenary" jurisdiction with respect to the merger—so that no other forum would have authority to determine the obligation of either the Pere Marquette or its successor, Chesapeake and Ohio, to plaintiffs as preferred shareholders thus denied their full contractual and statutory equity under the law of Michigan.

Nevertheless on April 1, 1947, the final order of the Commission, designated as Finance Docket No. 15228, was

promulgated by Division 4 approving the merger agreement upon the assumption that (Complaint, Exhibit 1-A, Sheet 32, emphasis supplied):

> This does not mean that the Chesapeake & Ohio and the Pere Marquette do not remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts. * * * *Whether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette is a question not within our province to decide* * * * Objecting stockholders have the right to present their case before two tribunals, both charged with the duty of protecting their interests * * * Possibly the courts may be called upon to determine controversies between dissenting stockholders and their companies. Because of the expense that might be involved, it is necessary that we consider that possibility.

It then concluded that, assuming maximum liability to dissenters to be less than $11,000,000 (*id.*), the sale of stock issuable to them under the merger "together with net current assets to be taken over in the merger, not only should fully reimburse Chesapeake and Ohio, but should exceed substantially, any probable expenditure of cash that it might be required to make in connection with the merger" (*id.* 33).

Following a denial of a petition for rehearing before the full Commission, plaintiffs filed a complaint against the United States and the Interstate Commerce Commission in a specially constituted three-judge District Court of the United States for the Eastern District of Virginia. The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company, and Alleghany Corporation as well as certain shareholders were permitted to intervene in support of the Commission's order. In their complaint plain-

tiffs contended that the Commission had unlawfully ignored its plenary statutory duty to protect their interests as dissenting shareholders and that, since the jurisdiction of the Commission was exclusive under the statute, no other tribunal would be entitled to adjudicate their rights. But the court ruled that no irreparable damage had been shown, denied plaintiffs' request for temporary and permanent relief, and—as the Commission had done—stated that its opinion was *not* to be construed as a ruling on the rights which plaintiffs might have under state law.

It is appellants' contention that the rulings of the court below constitute reversible error in that they not only prejudice but wholly ignore substantial rights of shareholders who have dissented from the merger agreement. Therein important questions of administrative and securities law are presented.

(E) Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The basic question involved is whether, since the statute provides that the jurisdiction of the Commission is not only "exclusive" but "plenary" both with respect to the approval of mergers (section 5) and the assumption of liabilities with respect thereto (section 20a), the Commission unlawfully found it "not within our province to decide" whether plaintiffs' legal equities as holders of preferred stock had been treated fairly in the merger exchange. Since the equities were not even considered in either the merger agreement or the Commission's opinion save as the latter mentioned them only in holding them irrelevant, the issue here is whether the Commission should have determined what they were and either have rejected the application for merger for failure to satisfy them or have

conditioned approval upon appropriate satisfaction of such equities.[4]

The question is basically statutory.[5] In section 5 of the Interstate Commerce Act, Congress need not have specified that it conferred "exclusive" jurisdiction, for that would have followed *sub silentio* to the extent that authority was actually conferred upon the Commission.[6] Even the precise terms indicating the extent of authority conferred need not be examined here[7] because here, unlike other statutes, it is expressly provided not only that the authority is "exclusive" but that it is "plenary." The latter means "full; entire; complete; absolute" according to common dictionaries. It is difficult to conceive, therefore, how upon this broad, unequivocal, and express language any-

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[4] Section 5(2)(b) of the statute not only expressly authorizes the Commission to impose terms and conditions but section 20a(3) authorizes the Commission to issue supplemental orders at any time "for good cause."

[5] Of course, if the statute were to be held to permit the Commission to wipe out shareholders' rights notwithstanding there were adequate funds to satisfy them and the merger was wholly voluntary, constitutional issues would arise as indicated in the *Treigle* and other cases heretofore cited and the saving clause of section 5(12) of the statute would be brought into operation. But the Commission took no such ground. Even if it had a discretion, it declined to exercise it. *Cf. Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194.

[6] See, for example, *Rice* v. *Santa Fe Elevator Corp.*, Nos. 470 and 472, U. S. Supreme Court, decided May 5, 1947; *Rice* v. *Board of Trade of City of Chicago*, U. S. Supreme Court, Nos. 471 and 473, decided May 5, 1947; *Bethlehem Steel* v. *New York State Labor Relations Board*, U. S. Supreme Court, Nos. 55 and 76, decided April 7, 1947; *Mayo* v. *United States*, 319 U. S. 441; *Penn Dairies* v. *Milk Control Commn.*, 318 U. S. 261; *Parker* v. *Brown*, 317 U. S. 341; *Cloverleaf* v. *Patterson*, 315 U. S. 148.

[7] See the cases mentioned in note 6 *supra*. Although many functions of the Interstate Commerce Commission are provided by statute without specification that they shall be "exclusively" performed by the Commission, the Supreme Court has said that "an action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted." *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 142. See also *Transit Commission* v. *United States*, 289 U. S. 121, 129, in which authority over acquisition of trackage rights is held "paramount and * * * necessarily exclusive."

thing can be left to any other forum or tribunal; and neither the Commission nor the court below has done more than assume the contrary.

The Commission's report not only disclaims "province" to determine the substantial question here involved but inconsistently states that "objecting stockholders have the right to present their case before two tribunals, both charged with the duty of protecting their interests" (Complaint, Exhibit 1-A, Sheet 32)—whereas the first and administrative tribunal has itself here said it is without jurisdiction. Although it acknowledges that "Congress always has had regard for private property involved by requiring us to consider the terms and conditions of unification proposals" (*id.* 31), it finds that that issue in this case "is a question not within our province to decide" (*id.* 32). Although it states that "it is difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than the provisions of state laws for compensation of dissenting stockholders on specified bases," it invites the parties here "to settle controversies • • • through • • • litigation in the courts" (*id.* 32).

Similar difficulties are shown in the Commission's treatment of its duty under section 20a, where it does not disclaim authority but seeks to satisfy its obligation by approving in advance and in an indeterminate amount the possible liability of the carriers concerned in the event of successful independent stockholders' suits (*id.* 32). The figures there given, and the means assumed to be sufficient to satisfy such liability (*id.* 33), are based upon no real examination into shareholders' rights and remedies because they are limited to such figures as happen to appear in the record documents respecting dissenters (*id.* 32) and the even smaller number of shareholders who have requested the special statutory remedy of appraisal under Virginia statutes (*id.* 33, note

14). But the limitation of potential liability to those who have dissented, or those who have sought such appraisal, is an unwarranted assumption. If, for example, the remaining vast majority of shareholders can show rights of recovery because of representations made in the proxy statements, the fact that they failed to dissent from the merger may be immaterial.[8] The suggested limitation of recovery to those who have sought appraisal under Virginia statutes is utterly immaterial so far as shareholders of Pere Marquette are concerned, because the latter hold under Michigan law.

The Commission has therefore wholly failed to exercise its "exclusive and plenary" jurisdiction with respect either to the merger agreement (section 5) or the assumption of liabilities in connection therewith (section 20a). On the other hand the statute speaks for itself and requires more of the Commission in either and both cases. Not only has the Commission not so limited its jurisdiction in the past but it has heretofore uniformly taken the contrary posi-

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[8] Under the heading "Statutory Rights of Dissatisfied Stockholders" the Proxy Statement reads (p. 14), "The statutes of Michigan contain no provision dealing with this subject." In this connection two official publications of the Government of the United States deal with the similar problems arising in an earlier phase of the creation of the augmented railroad system here involved. In 1938 the Securities and Exchange Commission issued its report on *Reorganization Committees pursuant to section* 211 of the Securities Exchange Act of 1934. It treats of "plans designed to eliminate arrearages of accumulated dividends on preferred stock" (pp. 109-197), the "elimination of minorities by dissolution, merger or consolidation of other companies" (pp. 294-335), and the "inadequacy of protection afforded minorities by appraisal statutes" (pp. 342-352). It reviews at length the basic rights of shareholders, under state law, on the merits of the controversy here involved. It reviews extensively the "plan of consolidation for the Alleghany Corporation and The Chesapeake Corporation," including the judicial correction (under Maryland law) of the attempt to wipe out accruals on preferred stock and "non-disclosure in soliciting material" (pp. 353-411). See on the same subject Part 10 of the *Investigation of Railroads, Holding Companies, and Affiliated Companies*, Senate Hearings pursuant to S. Res. 71, 75 Congress (1937).

tion[9] and Congress has amended and reenacted the statute without any other understanding (Transportation Act of 1940, 54 Stat. 905).

Because the statute is plain and because the Commission has not heretofore declined to exercise its exclusive and plenary jurisdiction, the Federal courts have not been called upon to determine the precise question here involved. But the Supreme Court of the United States has plainly indicated that "exclusive and plenary" means nothing less than primary and complete.[10] In *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150, the Court held that under section 5(2)(a) of the statute here involved the Commission and "not the courts" had exclusive authority to determine

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[9] "We are not impressed by these reasons for the failure to prepare and announce a plan for the protection of minority stock interests. Before we can approve an acquisition of control under paragraph (2) of section 5 we must find that the terms and conditions on which it is to be effected are 'just and reasonable in the premises.' They are not just and reasonable unless they include proper provisions for the protection of minority interests and we can not say that the provisions to be made for such protection are proper until we know what they are, nor prescribe proper provisions in the absence of adequate evidence which will enable us to determine what they ought to be." Unification of Southwestern Lines, 124 I.C.C. 401, 434. See also Nickel Plate Unification, 105 I.C.C. 425, 447-448; New York Central Unification, 150 I.C.C. 278, 320; Denver & St. L. Ry. Co. Control, 252 I.C.C. 153, 195. And see Cleveland, C. C. & St. L. Ry. Co., 22 F. 2d 509, 511 (CCA 6) for a judicial confirmation of this view. See also *United States* v. *Lowden*, 308 U. S. 225, note 1 at 233.

[10] The only distinction is drawn in those cases (1) where the issue raised is a claim of *ultra vires* under state law which is "remote" in the sense that only the state may raise it (*N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 26; *Cleveland etc. Ry.* v. *United States*, 275 U. S. 404, 413-414; relying on *Kerfoot* v. *Farmers' & Merchants' Bank*, 218 U. S. 281) or (2) the shareholder's cause of action is not directly related to the merger transaction (*N. Y. Central Securities Co.* v. *United States*, *supra*, 28-29, 54 F. Supp. 122 at 131; *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, 488, 41 F. 2d 806 at 811). Here, on the other hand, the State of Michigan is at least not the sole party in interest and the merger exchange-of-stock ratio was a principal issue in the merger agreement, in the proceedings before the Commission, and in the court below. Neither of those tribunals raised the slightest question that plaintiffs were proper parties there.

the terms and conditions under which trackage rights may be acquired notwithstanding that they "are consensual arrangements between the parties." In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 77-79, the Federal antitrust authorities were required to present antitrust questions to the Commission in a merger proceeding.

If the issue here presented is one within the "exclusive and plenary" jurisdiction of the Commission as the statute and the foregoing authorities indicate, then manifestly and admittedly the Commission has unlawfully failed to accord plaintiffs their rights as holders of cumulative preferred stock in Pere Marquette. It has been said by the Supreme Court on many occasions that the priorities of various classes of shareholders under a corporate charter must be recognized by courts and agencies which deal with the earnings or assets of their companies. *Otis & Co. v. Securities & Exchange Commission*, 323 U. S. 624, 634. The duty of the Interstate Commerce Commission under section 5(2) of the Interstate Commerce Act to determine the justness and fairness of merger plans is of the same type as that of the Securities and Exchange Commission under section 11(e) of the Public Utilities Holding Company Act of 1935 to determine the fairness and equitableness of simplification plans. In passing on action by the Securities and Exchange Commission involving a simplification plan, the Supreme Court has held that any arrangement or plan enforced without the consent of the parties affected by it, by which the subordinate rights and interests of stockholders are attempted to be secured *at the expense of the prior rights of other security holders*, is unfair and inequitable and will not be judicially sanctioned. In the *Otis* case cited above the Court said (p. 634):

> Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be "fair and equitable," incor-

> porates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and stockholders, exists also between various classes of stockholders. When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claim against earnings or assets, that superior position must be recognized by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion.

Under this principle of full priority no plan of merger or reorganization in which junior security holders are permitted to participate could be approved or permitted to stand unless senior security holders received full compensation for their prior rights as established by their contract. This rule has also been consistently applied by the Supreme Court in reviewing actions by the Interstate Commerce Commission in railroad reorganizations. *Case* v. *Los Angeles Lbr. Co.*, 308 U. S. 106; *Consolidated Rock Products Co.*, v. *Du Bois*, 312 U. S. 510; *Group of Investors* v. *Milwaukee Ry. Co.*, 318 U. S. 523.

The current proceedings—which already involve action by the Commission, three-judge court review, an appraisal proceeding subsequently initiated by Chesapeake and Ohio in the local courts of Virginia, this appeal, and an invitation by the Commission for plaintiffs to undertake an independent action in equity under the laws of Michigan—all demonstrate how completely the "exclusive and plenary" jurisdiction which Congress has conferred upon one Federal administrative tribunal will be complicated, confused, and frustrated. Should a bifurcated or trifurcated jurisdiction be approved by the Supreme Court, the cause of unification of carriers for the benefit of the National Transportation Policy will be ill served because many questions

will border on the several jurisdictions and require a multiplicity of proceedings which can only serve to deter unifications. The questions presented here are therefore both substantial and important.

(F) Statement Respecting Opinion

The court below delivered an opinion in connection with its entry of the final judgment in this proceeding. Copies of the final judgment and opinion are attached hereto and are made part of this jurisdictional statement.

Respectfully submitted,

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APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

CIVIL ACTION NO. 713

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES H. SCHWABACHER, MAY K. SCHWABACHER, JOHN L. SCHWABACHER, AND ETHEL S. SOKOLOW,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Defendants.

Final Judgment

This action having come on for hearing on the 4th day of June, 1947, at Alexandria, Virginia, before a statutory Court composed of three judges, upon the pleadings filed herein, and the arguments of counsel, and the Court having duly considered the same, and having filed its opinion herein on June 14th, 1947, it is

Ordered, adjudged, and decreed that the above-styled action be, and the same is hereby, dismissed.

(Sgd.) ARMISTEAD M. DOBIE,
United States Circuit Judge.
(Sgd. A. D. BARKSDALE,
United States District Judge.
(Sgd.) STERLING HUTCHESON,
United States District Judge.

June 16, 1947.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

C/A No. 713

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES E. SCHWABACHER, MAY K. SCHWABACHER, JOHN L. SCHWABACHER, AND ETHEL S. SOKOLOW,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

Defendants.

(Argued June 4, 1947. Decided —— ——)

Before Dobie, Circuit Judge, and Barksdale and Hutcheson, District Judges

DOBIE, Circuit Judge:

This is a civil action brought by plaintiffs, owners of 2,100 shares of 5% cumulative preferred stock of Pere Marquette Railway Company, to enjoin, set aside, annul or suspend, in whole or in part, an order of the Interstate Commerce Commission approving the merger of the properties and franchises of the Pere Marquette Railway Company into the Chesapeake and Ohio Railway Company for ownership, management and operation.

At a hearing in Alexandria, Virginia, before the three-judge court, we denied the temporary stay sought by plaintiffs. The case is now before us, upon a motion of defend-

ants to dismiss, on its merits. We think this motion must be granted.

Plaintiffs do not seek to set aside the merger, nor do they deny that the merger is in the public interest. They do claim, however, as set out in their complaint: "Failure to include protection for plaintiffs as dissenting shareholders, as a distinct class created by the merger is contrary to law and a direct violation of the Commission's statutory duty to impose just and reasonable conditions for the protection of all interests involved."

The Transportation Act of 1920, (as amended) Section 5, (49 U. S. C. A. § 5), requires that the terms and conditions of the merger be "just and reasonable." The Commission filed a long and elaborate opinion dealing with all the relevant issues in this case. One peculiarly pertinent paragraph is as follows:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the Company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues and assumptions of indebtedness, are just and reasonable."

Our conclusion is that this finding is within the powers of the Commission, it is based on substantial evidence, and is in accord with accepted legal standards. We think the Commission fully complied with all its statutory duties. That finding is, therefore, binding on us.

Reduced to its lowest terms, the case of the plaintiffs here seems to be based on the theory that dissenting stockholders (quite apart from any merit in the grounds of dissent) are entitled to preferential treatment, more favorable than the treatment accorded to stockholders of the

same class (holding the same securities) who did not dissent but agreed to the conditions in the merger agreement; and, as a consequence, if the Commission does not grant such preferential treatment to the dissenting stockholders, a three-judge district court is justified in setting aside or modifying the order of the Commission. We know of no case sustaining this (to us) novel principle. We think, further this theory has no support in practical economics or in commercial ethics.

As we read the opinion of the Commission, it did not attempt to pass upon what rights, if any, dissenting stockholders might have under the laws of the several States. It specifically left Pere Marquette and Chesapeake and Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." We adopt a like course. Nothing in our opinion is to be interpreted as in any way determining, affecting or prejudicing these rights, whatever they may be.

The motion of the defendants is granted and the civil action of the plaintiffs is dismissed.

Dismissed.

I concur.

(Sgd.) STERLING HUTCHESON,
U. S. District Judge.

6-12-47.